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NO. 95-116

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

DONNA WINTERS, an individual person,

Petitioner,

v.

COSTCO WHOLESALE GROUP BENEFITS PROGRAM and CONCEPT ADMINISTRATORS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

REPLY TO RESPONDENTS

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I. INTRODUCTION

For decades, insureds in all 50 states and the District of Columbia have enjoyed the protection of contra proferentem. *See, e.g. Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 540 (9th Cir. 1990), *cert. denied,* 498 U.S. 1013 (1990), *reh'g denied,* 498 U.S. 1074 (1991); Amicus Brief of NAIC at pages 4 - 6. This common law doctrine requires ambiguous terms in insurance policies to be construed in the insured's favor where the term reasonably covers the insured's claim.

The reason for this doctrine is simple fairness: since the insurer drafts its policy without input from the insured, and since the insurer's knowledge and drafting experience far exceeds

the insured's, the insurer should not be allowed to take advantage of any ambiguities it creates. *Id.*

In 1974, Congress enacted ERISA. Its purpose was threefold: to give participants in employee health benefit plans greater protection than they enjoyed under the common law; to clarify the scope of their insurance coverage; and to promote uniform insurance regulation. *See, e.g. Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989); *Aloha Airlines, Inc. v. Ahue,* 12 F.3d 1498, 1501 (9th Cir. 1993); ERISA, 29 U.S.C.A. § 1001(b). Since 1990 federal courts have been struggling to determine whether ERISA plan participants enjoy the protection of contra proferentem

which they enjoyed prior to ERISA, under the common law.

The circuits' struggle does not arise where the insurer has *not* given itself the power to interpret ambiguities, in other words, under de novo review. All circuits apply contra proferentem in such cases.

Paradoxically, the circuit dispute is whether contra proferentem applies where the insurer gives itself the power to interpret ambiguities, in other words, under discretionary review. Even more paradoxically, the Ninth Circuit in *Winters* has refused to apply contra proferentem under discretionary review if the plan is self-funded; stated differently, the Ninth Circuit *does not* apply contra proferentem where the employer is

the insurer and has given itself the power to interpret the plan.

The paradox is that insureds need *more* protection, not less, where the employer drafts the policy and also has the power to interpret ambiguities. Such an employer (who is a fiduciary to its employee/insured), faces an enormous conflict of interest, because it can increase its bottom line by refusing to pay claims arising under ambiguous policy terms. The insured, inexperienced in deciphering technical policy terms, does not know her coverage is inadequate until it is too late. Thus, the employer-as-insurer can lure quality employees with seemingly broad coverage, and then cut them off at claim time.

Petitioner asks this Court to resolve the paradox and settle the cir-

cuits' dispute by ruling that contra proferentem applies to all insurance contracts under ERISA. Application of contra proferentem will eliminate an employer's conflict of interest and its resulting incentive to draft ambiguous policies by holding the employer responsible if the insured's claim is reasonably within the scope of an ambiguous policy term. Application of contra proferentem will thus supplement ERISA's goals of protecting employees and clarifying the scope of their insurance coverage.

In addition, application of contra proferentem under ERISA will promote uniformity of insurance regulation. Presently, to decide whether to apply contra proferentem, courts must distinguish between non-ERISA and ERISA poli-

cies, between policies under de novo review and policies under discretionary review, and between indemnification plans and self-funded plans. A ruling that contra proferentem applies to all insurance policies will eliminate this patchwork and provide ERISA plan participants the same protection as their non-ERISA counterparts. *See also* Amicus Brief of NAIC at pages 10 - 11.

II. REPLY TO RESPONDENTS

A. An Administrator Abuses its Discretion by Interpreting Ambiguities Against the Insured.

Contra proferentem is related to the abuse of discretion standard in that an administrator abuses its discretion by interpreting ambiguous plan terms against the insured. Respondents dispute this, arguing that contra proferen-

tem and abuse of discretion are "unrelated concepts." Respondents' brief at page 8.

Respondents' argument derives from erroneously equating the abuse of discretion standard with the administrator's factual investigation. In fact, the investigation, like the duty to apply contra proferentem, is a *subset* of the overarching abuse of discretion standard: the latter applies when the policy is ambiguous, and the former applies when the policy is not ambiguous. Thus, when an administrator construes an ambiguous policy term, contra proferentem requires him find coverage without conducting an investigation, as long as the ambiguous term reasonably includes the insured's claim. Otherwise, the administrator abuses his discretion.

Respondents acknowledge this in their brief at footnote 2, page 8, but argue that courts, not administrators, should apply contra proferentem. Respondents' position would create an inefficient claims dispute process, because it would force insureds to litigate in order to obtain the benefit of contra proferentem.

In contrast, if the administrator applies the contra proferentem principle, the insured prevails (provided her claim is reasonably within the ambiguous term) and does not have to sue to receive health benefits. Contra proferentem therefore should be applied from the outset, by the administrator, to encourage prompt and inexpensive resolutions of claims disputes.

B. Contra Proferentem Requires the IVF Exclusion to be Interpreted in Petitioner's Favor.

In refusing to reimburse Winters for her GIFT procedure, Costco argued that its policy's IVF exclusion is ambiguous; that Costco has the right to interpret policy ambiguities; and that, under its interpretation, "IVF" includes GIFT.

Assuming Costco correctly claims "IVF" is ambiguous,[1] it still cannot prevail. This is because Costco should

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[1] Petitioner maintains, and the District Court agreed, that the term "IVF" unambiguously *excludes* GIFT. *Winters v. Costco,* No. C92-581WD (W.D. Wash. July 26, 1993), App. B at 11-16. *See also* Sharon Begley, *The Baby Myth,* Newsweek, Sept. 4 1995 at 41.

have interpreted the "ambiguous" IVF exclusion in favor of coverage. If this Court agrees, and applies contra proferentem to "IVF," Winters will recover benefits because contra proferentem dictates that "IVF" be construed in Winters' favor. Winters therefore has a personal stake in this litigation.

Respondents deny Winters' personal stake. They claim Winters cannot recover even if this Court applies contra proferentem, because of the Ninth Circuit's erroneous ruling that Costco's benefits denial was based on a reasonable investigation.

Respondents' argument is incorrect because it assumes an employer's investigation is pertinent to the interpretation of an ambiguous policy term such as Costco's IVF exclusion. In fact, the

investigation is pertinent only if the term is *unambiguous*. Contra proferentem applies where the term is ambiguous, and dictates that the insured prevail if the ambiguity reasonably covers her claim.

To allow the investigation to provide a basis for interpreting an *ambiguous* term is to allow the employer to retroactively alter the insurance contract to the detriment of the insured. This would be manifestly unfair. The employer-as-insurer implements its interests during the drafting process. The insured does not participate in the drafting, and is offered the policy on a take-it-or-leave-it basis. To permit the employer to interpret ambiguous terms in its own favor effectively permits the employer to continually improve

its already one-sided policy at the insured's expense.

Rather, the purpose of the investigation is not to interpret the policy, but instead to gather facts about the insured's situation and apply them to the policy to determine if the insured's claim falls within an *unambiguous* policy provision. In *Winters,* for example, Costco's Administrator's "investigation" (which was perfunctory and superficial) gathered "facts" about Winters' treatment and whether doctors generally consider fertility treatments to mean IVF. The Administrator reviewed three articles in popular periodicals like Time Magazine; a letter from a hired consultant who did not specialize in reproductive technology and who could not be located for trial; and an "IVF" notation

in Winters' medical records (although the Administrator did not speak to Winters' physician and these records were not part of the appellate record). *Cf.* Respondents' brief at 9-10. There is no evidence the Administrator even knew what GIFT was.

These "facts" allegedly were relevant to whether GIFT actually constitutes IVF, *see Kunin v. Benefit Trust Life Ins. Co., supra,* 910 F.2d 534, 538 (9th Cir. 1990) (finding a more comprehensive investigation unreasonable); they are not even arguably relevant to an interpretation of the policy term "IVF." In contrast, contra proferentem *is* relevant to an interpretation of "IVF," because it aims to interpret the

policy *itself*, the drafter's deemed intent, as opposed to the facts.

In this Petition, the issue is the meaning of the ambiguous IVF exclusion – whether it covers GIFT procedures – *not* whether Winters' procedure in fact constituted IVF. Therefore, whether the Costco's administrator abused his discretion in conducting his investigation is irrelevant, because it has no bearing on the scope of Costco's IVF exclusion.

In contrast, the applicability of contra proferentem *is* relevant to the scope of Costco's IVF exclusion. If this Court does not apply contra proferentem, Costco's expansive interpretation of "IVF" will stand, even though Costco's conflict of interest may have influenced its interpretation, and Winters will not receive the health bene-

fits she seeks. If this Court applies contra proferentem, however, the IVF exclusion will be interpreted in Winters' favor, and Winters will recover health benefits.

C. The "Covered Charge" Provision is not Properly Before this Court Because it was not Considered Below; Moreover, it does not Preclude Coverage for GIFT.

The "Covered Charge" provision is not properly before this Court because none of the three forums below (the Administrator, the district court, or the court of appeals) considered it. *See Winters v. Costco Wholesale Corp.*, 49 F.3d 550, 552, 554 (9th Cir. 1995), App. A at 2505, 2522; *Winters v. Costco Wholesale Group Benefits Program and Concept Administrators, Inc.*, No. C92-

581WD (W.D. Wash. July 26, 1993), App. B at 10-11.

Even if this Court were to address this new argument, it would not avail Respondents because the "Covered Charge" section does not preclude coverage for GIFT.

The "Covered Charge" section is not, as Respondents suggest, a list of covered, "medically necessary" operations or procedures. Rather, it is a list of general medical expenses that are covered if incurred for any specific operation or procedure covered elsewhere in the Plan. Therefore, Respondents' assertion that the "Covered Charge" list does not specifically mention GIFT is inapposite.

For example, "Covered Charges" include the "semiprivate [hospital] room

rate . . . reasonably necessary services and supplies provided by the hospital . . . the performance of the surgical procedure . . . the administration of anesthesia for the surgical procedure . . . [and] the postoperative care for the surgical procedure." *See* Costco Plan, Article V §§ 5.1, 5.2, 5.3, reprinted in the Appendix to this brief.

Winters' GIFT expenses consisted of such things as prescription drugs, doctors' fees, operating room fees and hospital fees. Since all these items appear under Costco's "Covered Charge" provision, Winters' GIFT expenses are "Covered Charges" for which she is entitled to reimbursement.

D. The Petition Accurately Describes the Circuits' Diverging Contra Proferentem Holdings.

As evidence of the circuit split, Petitioner respectfully refers the Court to the Petition.

Petitioner emphasizes that no circuit, with the sole exception of the Ninth Circuit in the instant case, applies contra proferentem to third-party plans but not to self-insured plans. The *Winters* panel did not explain why it made this distinction; nor did Respondents offer a reason for the distinction in their brief.

III. CONCLUSION

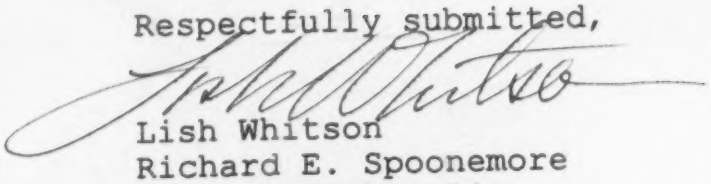
The Ninth Circuit's *Winters* decision creates a paradox by removing the protection of contra proferentem where insureds need it most: where the em-

ployer is both insurer and claims administrator. Such an employer has a fiduciary duty to its employee/insured, and faces a conflict of interest that may taint its claims denials under ambiguous terms. By holding the employer responsible for ambiguous drafting, contra proferentem provides the sole check against this conflict of interest and at the same time encourages unambiguous drafting.

By granting certiorari and ruling for Winters, this Court will end the Ninth Circuit's paradox. In so doing, this Court will also resolve the circuit split regarding the applicability of contra proferentem under ERISA. Both resolutions will further ERISA's purposes of employee protection, clarity of

coverage, and uniformity of insurance regulation.

Respectfully submitted,



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APPENDIX

ARTICLE V

Covered Medical Charges

5.1 General. This Article defines Medical Expenses which are considered Covered Charges by the Plan. Charges other than Covered Charges are not considered for Benefit payment by the Plan.

5.2 Inpatient Hospital Expense. Covered Charges include the Medical Expenses incurred for Inpatient Hospital Confinement including the cost of:

(a) Semiprivate Room Rate, Intensive Care Unit, and/or the Coronary Care Unit; and

(b) Reasonably Necessary services and supplies provided by the Hospital.

5.3 Surgical Fees and Administration of Anesthesia Expense. Covered Charges include Medical Expenses incurred for a Surgical Procedure including:

(a) the performance of the Surgical Procedure by the Physician(s) and his assistant;

(b) the administration of anesthesia for the Surgical Procedure by an anesthesiologist or a registered nurse anesthetist (R.N.A.); and

(c) the postoperative care for the Surgical Procedure rendered by the Physician(s) who performed the procedure, including periodic follow-up visits.